SUPREME COURT OF THE UNITED STATES

No. [redacted] 388

OCTOBER TERM, 1914.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

vs.

OHIO VALLEY TIE COMPANY, - Defendant in Error.

Brief for Plaintiff in Error on Motion to Dismiss, Affirm or Transfer to the Summary Docket.

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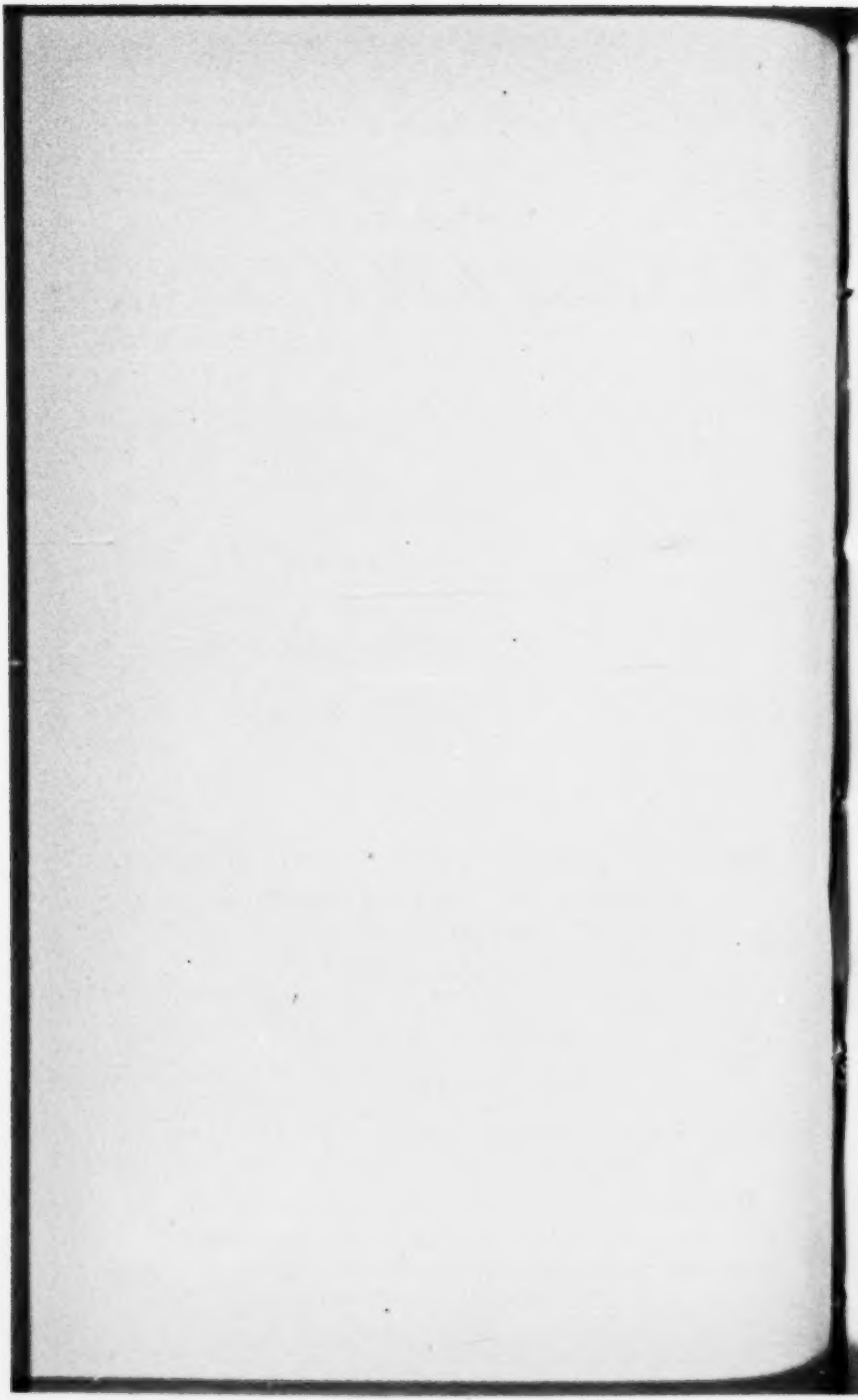
HENRY L. STONE,
Of Counsel.

April 12, 1915.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



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CITATIONS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 824.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - *Plaintiff in Error,*

versus

OHIO VALLEY TIE COMPANY, - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS, AFFIRM OR TRANSFER TO THE SUMMARY DOCKET.

Defendant in error has made a motion either to (1) dismiss this writ for lack of jurisdiction, or (2) affirm the judgment, or (3) transfer the cause to the summary docket. This is a motion by which it takes but little, if any risk. It has everything to win and nothing to lose; while the plaintiff in error has everything to lose and nothing to win. Manifestly it is necessary, therefore, for plaintiff in error to make a much fuller presentation of the case than defendant may consider necessary. Plaintiff's whole case is at stake.

STATEMENT OF THE FEDERAL QUESTIONS.

There are three federal questions presented by this record.

1. One is as to whether or not a shipper, complaining that he has been damaged by a carrier's charging excessive rates on interstate shipments can maintain an action in a *State* Court for such damages; especially where it appears from his own showing that he has filed a complaint on account of these acts before the Interstate Commerce Commission, and has there obtained an award of damages which the carrier has paid; the shipper claiming that the damages which he now seeks are "other or additional" damages, or what he calls "general damages," or damages resulting from the acts complained of before the Commission "in connection with other acts."

2. Another federal question is as to the right of the defendant in this case (the carrier) to have the jury instructed that so long as the rates complained of were in effect (even though ultimately held to be excessive) it was the duty of defendant to demand payment according to those rates and not to connive at any evasion of them.

3. And the third federal question is as to whether or not to require defendant, against its will, to send its cars off its rails and on to the rails and into the possession of another, or to mulct it in damages for a refusal to do so, is to deprive it of its property without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution.

STATEMENT OF FACTS.

The Ohio Valley Tie Company, which we will hereafter refer to as the Tie Company, is engaged in the business of manufacturing, shipping and selling railroad cross-ties. A good deal of its business is done along the line and over the rails of the Louisville & Nashville Railroad Company, which we shall hereafter refer to as the Railroad Company.

As far back as 1869 rates were established by the Railroad Company on cross-ties, which were higher than its rates on lumber (deposition of Mr. Milton H. Smith, Record, 155). And that difference existed from that time down to the institution of this action. From the year 1902—and we did not inquire any further back after specific rates—it appears that the Railroad Company classified cross-ties among the articles embraced in its 5th class (testimony of E. H. Dulaney, Record, 178, 179). Lumber has always been carried under a commodity rate, which is much lower than the 5th class rate in which cross-ties are embraced.

In 1908 the Tie Company began doing business along the line of the Railroad Company in getting out and transporting ties. At this time the situation as to interstate rates, respectively, on cross-ties and lumber, was that which we have just explained, to-wit, that the cross-ties were carried as 5th class, which bore a rate much higher than the commodity rate on lumber. It is claimed, however, that for two years, to-wit, until some time in 1910, the Railroad Company *did not enforce* its published

rate on cross-ties, but allowed them to be transported, and collected for them, under the commodity rate on lumber (testimony of Mr. Bush, President of the Tie Company, Record, 69, 73). Of course if this is true, it was a direct violation of the Act to Regulate Commerce, and the benefit of which the Tie Company received, but which it surely had no right to demand should continue. While the explanation of this violation of the law, if it occurred, is not really material in this case, yet the explanation seems to be found in the fact that during the period in question the bills of lading for the cross-ties, all of which originated in Kentucky, gave Louisville, Ky., as their destination, and it was not known to the Railroad Company that they were in fact interstate shipments, or its attention had not been sharply drawn to the question of whether they were in fact interstate shipments or intrastate shipments (testimony of H. G. Dempf, Local Freight Agent of the Railroad Company at Louisville, Record, 192). But some time during the year 1910 the question was raised as to the character of these shipments, and the Railroad Company became satisfied that they were interstate shipments, and that the interstate rate should be charged upon them, and it charged it and demanded its payment.

The Tie Company then began to resort to a manifest subterfuge in the attempt to evade payment of the interstate rate, by trying to so handle the shipments as to make them appear to be intrastate shipments, and not interstate shipments; it being true that the intrastate rate on cross-ties, due to a ruling of the Kentucky Rail-

road Commission, was the same as the lumber rate, and, therefore, was *lower than the interstate rate* on ties. That the Tie Company did thus attempt to evade the law is practically conceded in this record. Referring to the method of shipping ties to the Nickel Plate Railroad (which has no track at all in Kentucky, Record, 212), Mr. Bush, President of the Tie Company, speaking of the time when the Railroad Company began to demand payment of the interstate rate on ties, says:

> "When we received the second settlement showing all cars were now being assessed at the higher rate, *we changed our method of doing business.* We shipped those cars to the Ohio Valley Tie Company, Louisville, Ky., in care of the Big Four Railroad Company, and paid the Louisville & Nashville Railroad Company *freight up to Louisville at the lumber rate and reconsigned the cars to the Nickel Plate.*"

And on cross examination as to what he meant by changing his method of doing business, he was examined and answered as follows:

> "Q. The question was what was the change in your method of doing business?
>
> A. Shipped the ties which were intended for the Nickel Plate road in care of the Big Four Railroad in Louisville, and paid the Louisville & Nashville Railroad Company freight to Louisville, and reconsigned the car to Erie, Pa.
>
> Q. The business was practically the same character of business that it had been before, wasn't it?
>
> A. Yes, sir." (Record, 138.)

In other words, without changing the character of business at all, and when the shipment was admittedly

destined to a point outside of Kentucky, the Tie Company simply resorted to an expedient of consigning to Louisville and then reconsigning to a point beyond, in order to claim that the ties were intrastate shipments, and therefore should pay the intrastate rate, which was the lumber rate, and was lower than the interstate cross-tie rate.

It is true in this connection the Court of Appeals, in its opinion in this case, says that a litigation finally grew out of this question in a State Court in Kentucky, and that on appeal to the Court of Appeals it was held that according to the plan which the Tie Company had "hit upon," the shipments were intrastate (referring to Louisville & Nashville R. Co. v. Ohio Valley Tie Company, 148 Ky. 718), and that while a writ of error in that case was taken from the Supreme Court of the United States, yet this was "abandoned and the judgment paid before answering the case at bar." (Record, 212.) There is no basis, however, in this record for the latter statement, and it is not correct. The counsel for the Louisville & Nashville Railroad Company in that case were extremely confident of reversing the judgment of the Court of Appeals, and having this court determine that the shipments of cross-ties made under the circumstances shown by that record were interstate shipments, and therefore of course bore the interstate rate. And they were especially confident of this on account of a decision by this court, in Texas and New Orleans R. Co. v. Sabine Tram. Co., 227 U. S. 111, decided January 27, 1913, after the Court of Appeals' decision, above referred to. But

owing to the fact that the Tie Company had not only brought the suit mentioned in the State Court for the recovery of excess freight charges on the shipments there involved, but had also, in order to guard against the possibility of the court's holding the shipments to be interstate, filed a claim before the Interstate Commerce Commission (as explained by Mr. Bush in the present case, Record, 147), a settlement of that case was finally agreed upon by the parties after the record had been printed (No. 740, October Term, 1912), and pursuant to this agreement the writ of error in that case was dismissed.

We have made this somewhat extended explanation of a brief, but incorrect, statement in the opinion of the Court of Appeals, which puts the Railroad Company in the light of conceding that those shipments were intrastate, and therefore bore the intrastate rate, which it has never conceded, and has never believed, but the opposite of which it has always maintained, and which we think is conclusively settled by Texas, etc., R'y v. Sabine Tram. Co., 227 U. S., *supra*.

We now return to the statement from which we were carried off by the digression just made that, when the Railroad Company in 1910 demanded that on interstate shipments of cross-ties the published interstate rates should be paid, the Tie Company "hit upon a plan"—to use the language of the Court of Appeals—for making it appear that shipments which were actually interstate shipments, should be given the appearance of intrastate

shipments, although, as testified by Mr. Bush, the business was the same as it had been before.

When the Tie Company undertook thus to evade the law by that which was a patent subterfuge, the Railroad Company undertook to enforce its published rates, and to circumvent the attempted evasion of the Tie Company. It said to the Tie Company that if these shipments were, as the Tie Company contended they were, mere shipments to Louisville, then they must be unloaded at Louisville, and that the Railroad Company would not permit its cars loaded with these ties to go through to points beyond the river; although if the Tie Company would concede them to be interstate shipments and pay the published interstate rate upon them, they would be permitted to remain in the cars in which they had been loaded for destination, and would be permitted to *go through* as interstate shipments. That this was said to the Tie Company by the Railroad Company is admitted by the President of the Tie Company (Record, 109).

Of course this was a simple test of good faith. If these ties were really shipments destined to Louisville, there was no reason why they should not be unloaded at Louisville. On the other hand, if they were really shipments destined to a point beyond Louisville, and out of Kentucky, there was no reason why they should not pay the interstate rate. This position, however, taken by the Railroad Company to prevent the evasion of its tariff rate, was regarded by the Tie Company as a great outrage.

Another plan was "hit upon" by the Tie Company. It was believed that the Railroad Company's right to retain its cars and refuse to send them forward with cross-ties destined to points on other roads was confined to *its own cars*, that is, cars to which it had the title. And the Railroad Company therefore, in order to insure its ability to prevent the evasion by the Tie Company of this tariff, required the cross-ties of this particular company, along the Railroad Company's line through the State, to be loaded into cars belonging to the Louisville & Nashville Railroad Company, or, as they are briefly called, "L. & N. cars," because it knew it could control these. The Tie Company then offered to furnish other cars for the loading of its ties, and demanded that they should be accepted and forwarded. But this the Railroad Company refused, for the reason just explained. And this again is insisted upon as a great wrong.

The two positions taken by the Railroad Company, as just explained, to-wit, (1) the refusal to permit its cars loaded with the cross-ties of this company to go through to destinations outside the State, and (2) the insistence that the cross-ties of this company be loaded in L. & N. cars, and not in foreign cars, in order that the Railroad Company might control them, are enlarged upon in this record, both in the evidence and in the instructions of the Circuit Court, and in the opinion of the Court of Appeals, as evidences of malice on the part of the Railroad Company, and as an arbitrary discrimination against the Ohio Valley Tie Company in favor of other shippers generally, because such requirements were not made as to other

shippers. But there is not a scintilla of evidence in the record that any other shipper whose shipments were allowed to go forward to points in other States in the cars in which they were loaded, had attempted, or was in the habit of attempting, to evade the tariff of the Railroad Company by making interstate shipments while contending that they were intrastate shipments.

This controversy finally came to a head in the fall of 1911. On September 14, 1911, the Tie Company brought a suit in equity against the Railroad Company in the Jefferson Circuit Court of Kentucky, seeking a mandatory injunction, commanding the Railroad Company to receive certain cars, when billed in a certain way, and to deliver these cars over to the Pennsylvania Company at Louisville upon tracks controlled by the latter company, upon the payment of *intrastate rates* on the shipments (Record, 6). And on the following day, September 15, 1911, it filed before the Interstate Commerce Commission at Washington a complaint against the Railroad Company, complaining that upon 91 cars of cross-ties shipped from twenty-four different points in Kentucky and Tennessee to various points north of Kentucky, it had been charged excessive rates, the shipments being conceded to be *interstate* shipments (Record, 23, 24). On September 30, 1911, it instituted an action in the Jefferson Circuit Court, seeking to recover certain excess charges on 89 cars of ties which it claimed were *intrastate* shipments. The amount claimed in that case being $8,009.71 with interest, and in which it ultimately recovered a judgment for $8,189.91 (including interest), which is the judgment

that was affirmed by the Court of Appeals in 148 Ky. 718, heretofore mentioned, and in which a writ of error was taken from this court, but subsequently dismissed by agreement upon a settlement. And finally on December 9, 1911, the plaintiff brought the present action, in which it referred to all of the foregoing litigation and made many allegations as to alleged wrongs on the part of the Railroad Company, including not only the alleged wrong in charging excessive rates on the ties involved in the suit it had brought in the State Court (which ground of complaint in the instant case was ultimately ruled out and abandoned), but also in charging excessive rates *on the shipments of which it had complained before the Interstate Commerce Commission.* And it also alleged that it had been compelled to employ lawyers both before the Interstate Commerce Commission, and also in the State Courts, and had been compelled to give much time and attention to these matters, and also alleged that by reason of these excessive freight charges it had been deprived of the use of its capital, and that its credit had been impaired, etc., by all of which it was damaged in the sum of $100,000.00.

Defendant, the Railroad Company, filed a special demurrer to the petition; the demurrer being in two paragraphs. The first paragraph of the demurrer simply made the point that the petition showed on its face that so far as concerned the 89 carloads of cross-ties involved in the State Court case, there was an action pending concerning that alleged wrong, and that plaintiff had no right thus to split its actions against defendant, based

on the same wrongs. That paragraph of the demurrer of course raised no federal question.

The second paragraph of the demurrer, however, was in the following terms:

> "Defendant demurs to so much of the petition herein, as complains of defendant's alleged wrong in publishing in its tariffs for the transportation of interstate freight rates on cross-ties which are alleged to be extortionate and unreasonable; because under the Act of Congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, and its various amendments, the only tribunal having any right or power to give redress against the alleged wrongs complained of is the Interstate Commerce Commission of the United States, and *this court has no jurisdiction* to give relief for the aforesaid alleged wrong, or wrongs." (Record, 20, 21.)

After argument upon this demurrer the court sustained this second paragraph of the demurrer, but did so pursuant to a written opinion which the court filed, and by which it showed that the ground of its ruling in sustaining that demurrer was only temporary. In this opinion, so far as the second paragraph of the demurrer, to-wit, the paragraph raising the federal question, was concerned, the court said:

> "It seems clear that the Interstate Commerce Commission has the exclusive right to determine whether certain interstate rates as published are unreasonable or discriminatory. This is expressly held in Robinson v. Baltimore, etc., R. Co. (January 9, 1912), U. S. Sup. Crt. Advance Sheets, October, January, 1911, February 15, 1912, p. 114—*While the Commission can not award general damage*, for the

> enforcement of such extortionate or discriminatory rates, yet it can not be adjudged that *general* damage has been sustained, *until* the Commission has determined the rate unreasonable—if the inquiry could be first made by the court, it might be found by the court that the rate was unreasonable, while the Commission who has full power might determine that the rate was reasonable—the allegation of malice can not aid the court's right to inquire as to the reasonableness of the rate." (Record, 22, 23.)

In other words, while the court sustained this demurrer on the ground that the Interstate Commerce Commission must first determine whether or not the rates complained of were unreasonable, before they could be made the basis of any claim for damages, yet the court in fact decided, as shown by its written opinion, that the Interstate Commerce Commission had no power to award what the court calls "general damage," and that such general damage, therefore, must be obtained, if at all, in such an action as this.

After the court made this ruling, plaintiff simply waited until the Interstate Commerce Commission did decide the case which was pending before it. And when that decision was made the plaintiff, in the present case, filed an amended petition in which it stated, with very much more detail and specification than it had used in the original petition, that between May 27, 1910, and April 10, 1911, it had shipped 91 carloads of cross-ties from one point in Tennessee and various points in Kentucky to various points north of Kentucky; that defendant, Louisville & Nashville Railroad Company, had charged to and collected from it, pursuant to its interstate tariff, rates

that were in excess of the lumber rate, and were excessive and unreasonable; that it had filed a complaint before the Interstate Commerce Commission on September 15, 1911, praying that defendant be required to cease and desist from charging these excessive rates, and further praying that defendant be required to make reparation to plaintiff, on account of said unreasonable rates charged for the transportation of said 91 carloads of cross-ties; and that on April 8, 1912, the Interstate Commerce Commission had made an order granting the relief prayed for, a copy of which order was filed as an exhibit (Record, 24).

And the exhibit thus filed, to-wit, the copy of the order of the Commission, reads in part as follows:

> "It is ordered, that defendant Louisville & Nashville Railroad Company be, and it is hereby, authorized and directed to pay unto complainant, Ohio Valley Tie Company, on or before the 1st day of July, 1912, the sum of $6,198.00, with interest thereon at the rate of 6 per cent per annum from April 12, 1911, *as reparation for unreasonable rates charged for the transportation of 91 carloads of cross-ties* from Coal Creek, Tenn., to Cincinnati, Ohio, and from points of origin in Kentucky to Louisville, Ky., said ties all being destined to points north of the Ohio River as more fully and at large appears in and by said report of the Commission herein." (Record, 29.)

And subsequently on the trial the full report of the Commission, on which this order was based, was read in evidence by plaintiff, in which the Commission says:

> "We further find that complainant made the shipments as set forth in the foregoing table and paid

charges thereon at the rates herein found to be unreasonable; *that complainant has been damaged* to the extent of the difference between the amount which it did pay and the amount which it would have paid at the rates above set forth as lumber rates; and that it is therefore entitled to an award of reparation in the sum of $6,198.00, with interest thereon from the 21st day of April, 1911." (Record, 99).

It will be observed that the amended petition nowhere alleges that this order by the Commission for the payment of this money by the Railroad Company *had not been complied with.* And it could not truthfully have so alleged, because in fact it was complied with, as testified by the president of plaintiff on the subsequent trial of the action (Record, 133, 134).

Defendant did not again demur to the petition after the filing of this amendment, because the court had already in effect ruled in its written opinion heretofore mentioned, that while no complaint could be made of rates until they had been found to be unreasonable by the Commission, yet that the Commission had no power to award such "general damage" as was sought in the present case. And knowing that the question as to what matters complained of in the petition could be made the subject of an action in the State Court, and what not, could be raised upon the trial by objections to testimony or motions to exclude the same, and by instructions on the measure of damages in the action, separating what could be recovered from what could not, the defendant did not repeat its demurrer to the petition, but reserved that question for the trial.

In due course the issues were made up and the case came on for trial, and was heard before a jury. At the conclusion of all of the evidence defendant made the following motions for the exclusion of testimony, to-wit:

"1. Defendant moves the court to exclude and withdraw from the consideration of the jury all testimony of the witness, C. P. Bush, to the effect that on *interstate shipments* of cross-ties the L. & N. Railroad Company charged to and collected from the Ohio Valley Tie Company the rate fixed in its interstate tariff on 5th class freight; *and all testimony to the effect that the rates thus charged and collected were higher than the rates charged on interstate shipments of lumber;* and all testimony to the effect that the rates thus charged and collected on cross-ties *were unreasonably high or unjust;* because, under the Interstate Commerce Law of the United States, the Interstate Commerce Commission alone has the power to determine whether or not a rate charged and collected *is unreasonable*, and the right to determine *what damage*, if any, has been caused to a shipper by the charging of an unreasonable rate, and the fixing of the amount to be paid by the railroad company to a shipper as damages on account of the charging of such unreasonable rate; *and this court has no jurisdiction* to consider or determine *the amount of damages* that shall be charged to a shipper on account of the fact that a railroad company has charged to him and collected from him *an unreasonable rate* for the carriage of goods in *interstate commerce;* and in support of this motion, the defendant relies on the Act of Congress of the United States, ordinarily known as 'An Act to Regulate Commerce,' approved February 4, 1887, and the various amendments thereto.

"2. Defendant moves the court to exclude and withdraw from the consideration of the jury, any and all testimony offered in this case to the effect

that the L. & N. Railroad Company charged to the Ohio Valley Tie Company 5th class rate on cross-ties *moving in interstate commerce;* and any and all testimony to the effect that such rates thus charged were *too high,* or *unreasonable* or *unjust* for any reason; and *all testimony as to any damage done* to the Ohio Valley Tie Company *by reason of such charges;* because under the Interstate Commerce Law, of the United States, to-wit, the Act entitled 'An Act to Regulate Commerce,' passed by the Congress of the United States, and approved February 4, 1887, and the various amendments thereto, the sole right and jurisdiction to determine the question of the *reasonableness or unreasonableness* of a rate charged on interstate freight, and to determine also the question of the *amount of damage* done to a shipper by reason of the charging of an unreasonable rate, is vested in the Interstate Commerce Commission, and *this court has no power to determine such questions.*" (Our italics—Record, 55, 56.)

Each of these motions the court overruled and the defendant reserved exceptions (Record, 56).

Defendant also, at the same time, moved the court to exclude all the testimony as to excessive rates charged on the 89 carloads of ties, which were involved in the action in the State Court, and which were claimed to be intrastate shipments, but which defendant insisted that the record showed were interstate shipments. And the court likewise overruled that motion at that time; but as it subsequently, and before the case was finally submitted to the jury, practically reversed itself and sustained that motion, it is not worth while to notice it here (Record, 56). Thus by these motions to exclude testimony the defendant specially claimed that the court in which this

trial was pending had no jurisdiction to determine that plaintiff was damaged by reason of the alleged charging of unreasonable rates on interstate shipments of cross-ties; and therefore moved the court to exclude all testimony on that subject; and especially relied upon the Federal Act to Regulate Commerce as the foundation of this claim. And the court expressly denied the claim.

Then, not resting alone on these motions to exclude testimony, defendant moved the court to give to the jury the following instructions, which by the first two, covered the point we have thus far mentioned, and by the last two covered two other points, viz.:

"1. The court instructs the jury that *it can not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties.* (And at the time defendant offered this Instruction No. 1 it said to the court in writing: *In offering this instruction defendant relies upon the Federal Act to Regulate Commerce,* approved February 4, 1887, and the various amendments thereof, and insists that this court has no jurisdiction to consider or determine whether or not the rate on an interstate shipment of freight is unreasonable, and if so what damage the shipper has been caused thereby, unless and until the questions of the reasonableness of the rate and of the amount of the damage have been by court submitted to and heard and determined by the Interstate Commerce Commission.)

"2. The jury are instructed that they can not allow plaintiff as damages anything on account of the fact that defendant charged to and collected from it the rate upon 5th class freight for the shipment of cross-ties involved in the action of Ohio Valley

Tie Co. v. L. & N. R. R. Co., in the Jefferson Circuit Court, wherein judgment was given in favor of plaintiff for certain alleged excess charges of freight, and which judgment was appealed to the Court of Appeals, and which case was afterwards carried to the Supreme Court of the United States, where it is now pending. (And at the time defendant offered this Instruction No. 2, it said to the court in writing: In moving the court to give the jury this instruction, defendant relies upon the Federal Act to Regulate Commerce, approved February 4, 1887, and all amendments thereof, and insists that it is shown both by the record in the action referred to and in the present action that the shipments of cross-ties referred to in that action were interstate shipments, and that the question of the reasonableness of the rates therein involved had never been submitted to the Interstate Commerce Commission, nor determined by it. *And that this court has no jurisdiction to determine the question of the reasonableness of said rates, nor the question of the damages, if any, resulting from charging the same.* And defendant also insists that plaintiff having recovered judgment on account of the charges of rates involved in that action, can not further recover any additional sum herein, based on the same alleged wrongful acts.)

"3. The court instructs the jury that defendant, Louisville & Nashville R. R. Co. had a right to keep its cars on its own tracks, and it was not therefore guilty of any wrong in refusing to allow its cars to go off of its own tracks.

"4. The court instructs the jury that *under the Federal Act to Regulate Commerce,* the defendant Railroad Company was required by said Act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have

> charged or collected from any such shipper a rate different from that which, at the time of the shipment, was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission and in effect *or to have connived at any arrangement whereby the payment of the rate fixed by such tariff should be evaded.''* (Our italics, Record, 57, 58.)

The court refused each of these instructions and defendant reserved exceptions (Record, 58), though it is true that while the court overruled the motion to give Instruction No. 2, as to the charges involved in the action pending in the Jefferson Circuit Court, it did subsequently direct the jury to disregard all of the testimony concerning those shipments (Record, 61), and in the instructions which the court did give, it did not authorize the jury to find any damages based on the excessive charges involved in that State Court action (Record, 59).

Thus again, by the instructions which defendant offered, above quoted, the court was expressly asked to instruct the jury that they could not allow any damages on account of defendant's having charged and collected from plaintiff unreasonable rates of freight on interstate shipments; and the Act to Regulate Commerce was expressly named and relied upon as the foundation for that instruction. It may be that the proposition stated, as to the effect of the Act to Regulate Commerce, in giving the reason for the instruction offered, was too broadly stated, or not accurately stated, yet the essential point was made that *on account of the provisions of the Federal Act to Regulate Commerce,* the court should instruct the jury

in that case that it *could not allow any damages on account of charging unreasonable rates on interstate shipments.* We will recur to this matter hereafter.

The court gave the jury elaborate instructions. The first instruction was the main one, and was very long. We will not attempt to epitomize it, though we paragraph it and designate the paragraphs by letters. This paragraphing and lettering was not done by the court, but we have resorted to this simply for purposes of clearness. The instruction was as follows:

"A. If you believe from the evidence in this case that the rates on cross-ties *which were found to be unreasonable by the Interstate Commerce Commission by its order of April 8, 1912,* were, to the extent said rates exceeded the rates then in force on lumber, wilfully and maliciously maintained by defendant with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that *said rates which were charged plaintiff* were, when so maintained, *known by defendant to be unreasonable to said extent,*

"B. Or that defendant for the purpose of injuring plaintiff's said business or of deterring plaintiff from buying ties along the line of defendant's railroad wilfully and maliciously *failed to furnish cars* requested by plaintiff for the shipment of ties previously offered by plaintiff for shipment at times when it might, by the exercise of ordinary diligence, have furnished cars for said shipments, without interference with the rights of others,

"C. Or wilfully and maliciously, with intent to injure plaintiff's said business, or with intent to deter plaintiff from buying ties along the line of the defendant's railroad, *refused to accept the cars of another carrier tendered by plaintiff,* if any were so

tendered, for the shipment of ties when the defendant's own cars were not available for that purpose, and when defendant was accustomed, if it was so accustomed, to accept the cars of other carriers when tendered by other shippers under substantially similar circumstances and conditions,

"D. Or that defendant wilfully and maliciously, with intent to injure plaintiff's business of buying and selling ties or with the intent to deter plaintiff from buying ties along the line of defendant's railroad *refused to permit ties shipped by plaintiff to Louisville in carloads to go forward to points on connecting lines without being unloaded,* and required said ties to be transferred from the cars in or on which they reached Louisville over defendant's line to other cars for forwarding to points beyond Louisville on connecting lines when defendant was accustomed, if it was so accustomed, upon request therefor under substantially similar circumstances and conditions to permit cars which reached Louisville over its lines loaded with ties or other goods shipped by persons other than plaintiff to go forward to other such points without being unloaded,

"E. And that defendant by such act or acts, if any were committed, *did tie up a part of plaintiff's capital or did impair and injure plaintiff's business or credit,* or did injure the cross-ties of plaintiff or subject plaintiff to expense as defined in Instruction No. 4 or cause it to lose time from its business of buying or selling ties,

"F. And if you further believe from the evidence that *by said acts or any of them,* if defendant committed such acts or any of them, the plaintiff's business was damaged,

"G. Then you will find for the plaintiff in such sum of money as you believe from the evidence will reasonably compensate the plaintiff for such injuries, if any were sustained by plaintiff, not to exceed in all the sum of $100,000.00,

"H. But unless you believe from the evidence that the defendant did maliciously commit the acts or some of them above referred to, and unless you further believe from the evidence that such act or acts if committed, did cause injury or damage to the plaintiff, then you will find for defendant." (Record, 59, 60.)

The court also gave to the jury, among others, the following instruction:

"No. 5. If you find for the plaintiff, you must not include in your verdict any sum or sums representing the difference or differences between the rate for hauling lumber and the 5th class rate paid by plaintiff on shipments of cross-ties." (Record, 60.)

The court further instructed the jury that they might find certain expenses and damages to cross-ties, and might find punitive damages; and that if they did find any of those things, they must find them separately. Those instructions, however, are not material here to quote.

The jury found the following verdict:

"We, the jury, find for the plaintiff for the sum:

$771.56, expense of transferring ties as mentioned in article No. 4.
$1,000.00, attorneys' fee.
$200.00, loss of time and service performed.
$5,000.00, injury to plaintiff's ties.
$50,000.00, damage to plaintiff's business and credit as mentioned in Article No. 1."

(Record, 46.)

Defendant immediately moved for a new trial on the grounds that the verdict was excessive and that there were errors in giving and refusing instructions, and in the admission and rejection of testimony, using the general form of alleging these grounds as authorized by practice in Kentucky (Meaux v. Meaux, 81 Ky. 475, 479) and subsequently filed these additional grounds for a new trial, to-wit:

> "To require defendant, against its will, to send its cars out of its possession and off of its tracks into the possession of another railroad company, and upon the tracks of another railroad company, is to deprive defendant of its property *without due process of law*, contrary to the provisions of the Constitution of the United States, and especially of the Fourteenth Amendment thereof; and the court's instructions herein in directing the jury that it could allow damages against defendant on account of its refusal to permit its cars to go out of its possession and off its tracks into the possession of another railroad company, and on the tracks of another railroad company, did thus deprive defendant of its property without due process of law, contrary to the said Constitution." (Record, 61.)

The reason for filing this separate and somewhat extended and specific ground for a new trial, in addition to the general grounds of error in giving and refusing instructions, was that when the instruction on this subject of forcing cars out of plaintiff's possession was given, this provision of the Constitution, and this claim that to take these cars out of defendant's possession was to deprive it of its property without due process of law, had not been specially called to the court's attention, either

at the time the instruction on that subject of taking defendant's cars was offered by defendant (defendant's Instruction No. 3), or at the time the instruction on that subject was given by the court. And the point was therefore called to the court's attention in this way by this separate ground for a new trial.

The motion for a new trial, however, was overruled, and an appeal was taken to the Court of Appeals of Kentucky, where the judgment was affirmed, after which the writ of error from this court was allowed by the Chief Justice of the Court of Appeals with supersedeas.

It would not have occurred to us to discuss in this case the excessiveness of the verdict of the jury; but as counsel for defendant in error have invited the court's attention to the opinions both of the trial court and the Court of Appeals on that subject, and have asserted that the verdict is not excesive, it may be excusable for us to say briefly this: The jury's verdict, which the court upheld, gave plaintiff $50,000.00 under the vague designation of "damage to plaintiff's business," *in addition to giving separately every item of damage that plaintiff attempted to prove;* and not only was this grossly excessive, but it can be mathematically demonstrated from this record that the same items of damage have been allowed *twice,* once specifically, and once under the heading, "damage to business." Neither the original petition, filed December 9, 1911, nor either of the two subsequent amended petitions, alleged any *permanent* loss of business. Plaintiff's president proved its damage by swearing that for the fiscal year ending September 1,

1911, it made a *profit* of $27,000.00, and for the next year, ending September 1, 1912, a *loss* of $28,000.00. He was asked to "add these two sums together *for the convenience of the jury,*" which he did, making $55,000.00; and the jury gave a verdict for $50,000.00 for "damage to business," although all the excess freight charges collected from it have been admittedly *paid back,* and all the extra costs of operation, including even attorney's fees, and the loss in depreciation of cross-ties left on the ground, were *allowed for separately* by the verdict. It might be suggested that the loss of the year complained of was due to a great falling off in *amount of business.* But that explanation is excluded because the petition alleged that "plaintiff has built up a large and lucrative business handling *approximately one million cross-ties each year*" (Record, 2), and plaintiff's president testified that in the year complained of it "handled *slightly under 1,000,000 ties*" (Record, 64), thus showing that the normal amount of business was done. Then if the *normal amount* of business was done, and all the *extra cost* of handling the business and *loss in depreciation of material,* due to defendant's alleged wrongs, have been paid or separately allowed for, it is impossible to conjecture how defendant's actions caused plaintiff an *additional* loss called "damage to business" of $50,000.00; and this is made all the more difficult to understand where it is seen that plaintiff's business done on that portion of the Louisville & Nashville Railroad, where the trouble occurred, *only amounted to 18% of its total business.* There are other ways in which money can be lost in busi-

ness than by transportation troubles. And if it be true that plaintiff made a *profit* of $27,000.00 in the year ending September 1, 1911, and a *loss* of $28,000.00 in the year ending September 1, 1912, this was manifestly due to some other cause or causes than such as can be charged to defendant; and the *loss on the books* to which plaintiff testified, and which the jury evidently allowed, undoubtedly included those very excess freight charges which the court told the jury it should not allow (for they had been repaid), and the very items of loss and expense which the jury allowed separately.

MOTION TO DISMISS.

It should be explained that there is no such thing as an *assignment of errors* on appeal under the Kentucky practice. Such assignment was at one time required, but this provision of the Code was repealed many years ago, and any error committed by the trial court, which is shown by the record of the proceedings in that court, and which is to the substantial prejudice of the losing party, is now brought before the Court of Appeals by simply getting an order allowing an appeal from the final judgment and lodging the record in the clerk's office of that court. And, as neither briefs nor oral arguments are made matters of record, there is no way of showing what matters are argued by counsel, for of course this court will not receive affidavits from a party to show that his counsel had argued certain points orally or by brief, nor from the opposite party that he had not done so.

FIRST FEDERAL QUESTION.

The Court of Appeals in its opinion affirming the judgment of the Circuit Court, says:

> "The appellant next offers *as a bar* to the prosecution of this action, the fact that appellee elected to go to the Interstate Commerce Commission with complaint of unreasonable rates, and asked damages on that account. It argues that to permit appellee to recover *other or additional damages* growing out of or incidental to the acts complained of will be a direct violation of the Interstate Commerce Act. To support its contention, it relies upon Section 9 of the Act.
>
> " 'Section 9. That any person or persons, claiming to be damaged by any common carrier subject to the provisions of this act, may either make complaint to the Commission, as hereinafter provided for, or may bring suit, in his or their own behalf, for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons, shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.'
>
> "We do not believe this position is tenable for three reasons: (1) This objection should come by way of a plea in abatement, and (2) the Interstate Commerce Commission as to damages is not a court, and its finding in that regard is evidently (evidential?) merely—neither binding nor conclusive; and (3) the instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of charging excess freights." (Record, 218.)

The court here shows that defendant did rely on the Act to Regulate Commerce, but it does not state fully or correctly defendant's position, and from its statement that "this objection should come by way of a plea in abatement," the court shows that it misconceived defendant's position; for it would be impossible for defendant by a *plea in abatement* to make the objection which it did make in the Circuit Court, and in the Court of Appeals, and which it now makes. Sections 8, 9, and 16 of the Act to Regulate Commerce provide as follows:

> "Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.
>
> "Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two

methods of procedure herein provided for he or they will adopt, etc.

"Sec. 16. That if, after hearing on a complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State Court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit."

Thus we see that by Section 8 of the Act, any common carrier who shall violate its provisions is made liable "for the full amount of damages sustained in consequence of any such violation of the provisions of this act"; and by Section 9 the complaining party may proceed

"for the recovery of the damages for which such common carrier may be liable under the provisions of this act"; which damages, as we have seen by Section 8, is "the *full amount* of damages sustained in consequence of any such violation of the provisions of this act." And he is given a chance to proceed either before the Interstate Commerce Commission, or in a District or Circuit Court of the United States of competenet jurisdiction; the provision being made, however, that he shall not have the right to pursue both remedies, and must elect which one he will pursue.

Thus if the party complaining of damage by reason of a violation of the Act to Regulate Commerce chooses to go in the first place into court, rather than before the Commission, or chooses to go into court before any action is taken by the Commission on the question of damages, he must go into a "District or Circuit Court *of the United States* of competent jurisdiction." And this court has so declared.

In Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S. 247, the court said:

> "The plaintiff's cause of action for damages occasioned by the payment of illegal or unreasonable allowances was one which, under Sections 8 and 9 of the Commerce Act (24 Stat. 382), *could only be brought in a District or Circuit Court of the United States.*" (Page 250.)

Therefore, under Sections 8 and 9 a *State Court* has no jurisdiction of an action for damages based on what is claimed to be an unreasonable charge for transporta-

tion. Section 16 of the Act, however, by the amendment of June, 1910, does give a State Court jurisdiction of a claim for damages for a violation of the act *under one state of facts*, and that is where the complaining party, exercising the election given him under Section 9, has gone before the Commission with a claim for damages and has been awarded damages, and where the carrier *has not complied* with the Commission's order for payment. In that event, and *in that event only*, can he bring an action in the State Court for damages resulting from a violation of the act. And the petition including the amended petition, in the case at bar *did not allege that condition*, and it is conceded that such condition did not exist, *for the order was complied with.*

Now it seems to us, beyond possibility of controversy that these objections to the proceeding in the case at bar in the State Court *could not appropriately have been raised by a plea in abatement.* The original petition showed that it was seeking damages based in part at least upon actions which were violations of the Act to Regulate Commerce, to-wit, the charging of unreasonable rates for transportation, and while it showed that complaint had been made before the Interstate Commerce Commission, it showed affirmatively that the Commission had not acted upon the complaint. Therefore, the *State Court* had no jurisdiction of the claim for damages, so far as based on those acts of making unreasonable charges for interstate transportation. Manifestly, this objection then was not one to be set up by a plea in abatement. The point was not that another action or proceeding was

pending based on the same cause of action, but the point was that the State Court, as the petition showed, had no jurisdiction at all to give the damages claimed, so far as they were based on the acts just mentioned. Then, when the amended petition was filed, which alleged in detail the facts as to the complaint before the Commission, and which showed that the Commission had made an order for payment of damages on account of the charging of these excessive rates, it did not allege, and could not truthfully have alleged, that the order had not been complied with. And, therefore, the petition did not bring the case within the only condition where a State Court is given jurisdiction of a claim for damages growing out of a violation of the act, to-wit, under Section 16, where the Commission has determined that a complainant is entitled to an award of damages for a violation of the act, and has made an order directing payment, and where the carrier has *failed to comply with the order.*

Manifestly, therefore, this was not a matter to be pleaded in abatement. It was simply a case where the State Court had no jurisdiction to give damages as claimed by the petition or amended petition, so far as based upon the act of charging illegal rates on interstate transportation; and that claim was specially set up at a proper time and in a proper manner.

As has been seen from our statement of facts heretofore made, the Railroad Company insisted, and insisted of record, from the very beginning of this case in the State Circuit Court down to the end of it in the petition for rehearing in the Court of Appeals of the State, that

the court had *no jurisdiction* to give damages as claimed by the plaintiff, *so far as they were based on the alleged violations of the Act to Regulate Commerce.* The arguments or legal propositions stated at the various times when these objections were made, as reasons for insisting that the court had no jurisdiction, may not always have been exact, may sometimes have been too broad, *but the essential point that, under the provisions of the Act to Regulate Commerce, the court had no jurisdiction of the claim for damages based on those acts,* was clearly and distinctly made again and again. And a party is not confined to making always exactly the same argument he may have made at the beginning upon any particular proposition. Thus this court, in Dewey v. Des Moines, 173 U. S. 193, speaking of certain questions raised in this court, said:

> "If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.
>
> "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." (Page 197.)

As we have seen, the defendant in its demurrer to the original petition, said:

> "Defendant demurs to so much of the petition herein, as complains of defendant's alleged wrong in publishing in its tariffs for the transportation of interstate freight rates on cross-ties which are al-

leged to be extortionate and unreasonable; because under the Act of Congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, and its various amendments, the only tribunal having any right or power to give redress against the alleged wrongs complained of is the Interstate Commerce Commission of the United States, *and this court has no jurisdiction to give relief for the aforesaid alleged wrong, or wrongs.*" (Record, 20.)

It may be that we were incorrect in saying that the Interstate Commerce Commission was the only tribunal having power to give the redress claimed; but we believe we were correct in saying that the court *in which the action was pending* had no jurisdiction whatever to give the relief.

It is true that demurrer was at that time sustained, but, as we have heretofore explained, and as the written opinion then filed showed, merely on the ground that the plaintiff would have to wait until the Interstate Commerce Commission had passed upon the *reasonableness or unreasonableness of the rates,* the court being of the opinion that the Commerce Commission had no power at all to give what the court styles "general damages." (Record, 22, 23.)

Then on the trial, as we have seen, the defendant moved the court to exclude all proof as to unreasonableness of rates, and all proof as to *what damage,* if any, had been caused by charging unreasonable rates; defendant claiming at the time, as shown by the record, that "*this court has no jurisdiction* to consider or determine the *amount of damages* that shall be charged to a shipper on account of the fact that a railroad company has

charged and collected from him an unreasonable rate for the carriage of goods in interstate commerce"; defendant stating at the time that "in support of this motion, the *defendant relies on the Act of Congress* of the United States, ordinarily known as 'An Act to Regulate Commerce,' approved February 4, 1887, and the various amendments thereto." (Record, 55, 56.)

The proposition here asserted merely as a general proposition, applicable to all cases, may be too broad, but, *as applicable to this case,* if our view of the law is correct, it was true, because, in our view of the law, a State Court has no jurisdiction of a claim for damages resulting from an act which is a violation of the Act to Regulate Commerce, except in that class of cases where the Interstate Commerce Commission has made an award of damages and ordered the payment of damages, and the carrier *has failed to comply with the order;* and in this case the petition itself showed that the Commission had made an award of damages and an order for the payment of money, but *did not show that the carrier had failed to comply with the order;* and, on the contrary, the president of the complainant had affirmatively stated on the witness stand that the award had been paid by the carrier. Therefore, while the proposition asserted in support of the motion to exclude this testimony may have been too broad, or may have been erroneous as a general proposition applicable to all cases, it was true as applicable to this case.

Then, on the motion for instructions, defendant moved the court to instruct the jury that it could not in this

action allow any damages to plaintiff "on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties." And defendant at the time said to the court that in support of this motion for instructions it *relied upon the Act to Regulate Commerce.* It is true defendant at that time used the language commented on by counsel for defendant in error, saying: "This court has no jurisdiction to consider or determine whether or not the rate on an interstate shipment of freight is unreasonable, and if so what damage the shipper has been caused thereby, unless and until the questions of the reasonableness of the rate and of the amount of the damage have been by court submitted to and heard and determined by the Interstate Commerce Commission." (Record, 57, 58.) We think the court will recognize that the words, "by court," occurring in this sentence, are an error which in some way has crept into the record. They make no sense and should not be there. And the statement here made that the court has no jurisdiction to consider or determine the reasonableness of the rate, or what damage was thereby caused, unless and until the questions of the reasonableness of the rate and the amount of the damage had been submitted to and determined by the Commission, is inapt and incomplete. The idea that was really intended to be conveyed was simply the same that had been steadily maintained all through the case, viz., that the Commission had the *sole power* to determine (1) the *reasonableness of the rate and* (2) *the amount of the damage,* and

that all a court could do was to *enforce the order of the Commission;* and therefore, as the record in the present case showed the order of the Commission to have been complied with, the court was asked to instruct the jury in the case at bar that it *could not allow any damages whatever on account of the charging of these unreasonable rates.* But, as said before, whether the argument then sought to be made, or the legal proposition in support of the motion for the instruction, was, or was not, accurate or complete, or true as a general proposition applicable to all cases, the claim was distinctly made that, by reason of the provisions of the Act to Regulate Commerce, the court in which the action was pending had no jurisdiction to allow claims for damages based on the charging of these unreasonable rates, and that for that reason the court should instruct the jury not to allow anything on that account.

Thus we see that this claim by defendant that, on account of the provisions of the Federal Act to Regulate Commerce, the court had no jurisdiction in this case to give a judgment for damages, so far as it was based on alleged acts that were in violation of the Act to Regulate Commerce, to-wit, the charging of unreasonable interstate rates, was made from the beginning to the end of the trial in the State Circuit Court, and *this question could not have been made by a plea in abatement.* In fact the Court of Appeals of Kentucky has heretofore in a most elaborate opinion held that there is no such thing in Kentucky as a technical "plea in abatement"; that the only kind of defensive pleading is an *answer*—

Louisville Home Tel. Co. v. Beeler, 125 Ky. 366, 373. But there was no occasion to make the point by any kind of a plea or answer, because the facts appeared on the face of the petition; though even if they had not so appeared, *an objection to the jurisdiction of the court over the subject-matter of an action is never waived by a failure to plead.* Not only is this a general proposition of law, but it is expressly so declared by the Code of Practice of Kentucky, which provides:

> "A special demurrer is an objection to a pleading which shows:
>
> 1. That the court has no jurisdiction of the defendant or of the subject of the action; or,
>
> 2. That the plaintiff has not legal capacity to sue; or,
>
> 3. That another action is pending, in this State, between the same parties, for the same cause; or,
>
> 4. That there is a defect of parties, plaintiff or defendant. Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, *except the objection to the jurisdiction of the court of the subject of the action,* which objection is not waived by failing so to make it; but a party failing so to make it when or before he files a pleading, other than a demurrer, is liable for all costs resulting from such failure." (Kentucky Code of Practice, Section 92.)

And again:

> "118. A party may, by an answer or other proper pleading, make any of the objections mentioned in Section 92, the existence of which is not shown by the pleading of his adversary; and failure so to do is a waiver of any of said objections, *except that to the jurisdiction of the court of the subject*

of the action.'' (Kentucky Code of Practice, Section 118.)

And as objection to the jurisdiction of a court over the subject of an action is never waived by failure to plead, so the objection that a petition *does not state a cause of action* is never waived by failure to plead. And whether a true statement of the legal situation be that, as to the claim for damages on account of the charging of excessive interstate rates, the *State Court had no jurisdiction* or that the petition simply *did not state a cause of action*—though we think the former is correct—is not material. In either event, the claim was made that there was no right of recovery on account of those acts; and this claim was based expressly on the Act to Regulate Commerce.

AUTHORITIES.

The mere fact that the Court of Appeals of Kentucky in its opinion in this case gives as one of the reasons why defendant's objection can not prevail, that this objection should ''come by way of a plea in abatement,'' does not destroy defendant's right to insist upon its objection in this court. A party's claim to protection under a Federal Act can not thus be taken away from him by a State Court, as many decisions by this court show.

Probably the most strikingly applicable case is National Mutual B. & L. Assn. v. Brahan, 193 U. S. 635. An action was brought in a State Court of Mississippi to recover interest claimed to have been usurious. Defendant pleaded the general issue and gave notice of what it

expected to prove. Neither in the pleading nor in the notice was any reference to any Federal question. Subsequently defendant offered to amend its notice, the amendment claiming a right under the Fourteenth Amendment to the Federal Constitution; but this amendment was stricken out on the ground that it was filed without leave of court. So far, therefore, as the pleadings, or notice under the pleadings, were concerned, no Federal question at all was made. But at the conclusion of the testimony defendant asked the court for certain *instructions* based in part on its claim of right under the Federal Constitution, which motion for instructions the court overruled. On writ of error from the Supreme Court of Mississippi the defendant in error insisted that *the Federal question had not been properly raised in the court below,* and the Supreme Court of that State *so held,* saying that the proceeding in the lower court was "an ingenious but unsuccessful effort to inject the Federal question into the record." And therefore the court did not pass upon the Federal question. This court, however, held that the Federal question was properly raised and therefore refused to dismiss the writ of error, although it affirmed the judgment on the merits. On the question of jurisdiction the court, by Mr. Justice McKenna, said:

> "It is objected that the Federal questions presented can not be considered 'because they were not raised in time and the proper way,' and that the Supreme Court did nothing more than decline to pass on the questions because they had not been raised in the trial court, as required by the State practice.

"The Supreme Court considered that plaintiff in error, by the motions to amend the notice, attempted to 'inject' a Federal question into the record, and that the instruction asked by the plaintiff in error had the same purpose. The court said: 'It was another ingenious but unsuccessful effort to inject the Federal question into the record. If the court had allowed the amended notice and pleas to be filed, which presented nothing on the merits, but simply the alleged Federal question, then there would have been an issue involving the Federal question, to which an instruction would have been appropriate.'

"Upon the ruling of the court upon the amendments to the notice we are not called upon to express an opinion, but, we think, it is very clear that plaintiff in error was entitled to claim rights under the Constitution of the United States based upon the case as presented. And if the rights asserted actually existed, plaintiff in error *was entitled to an instruction* directing a verdict in its favor. The claim was, therefore, made in time. Green Bay & M. Canal Co. v. Patten Paper Co., 172 U. S. 58; Rothschild v. Knight, 184 U. S. 334; Meyer v. Richmond, 172 U. S. 82; Mallett v. North Carolina, 181 U. S. 589; Dewey v. Des Moines, 173 U. S. 193. It was also sufficient in form." (Page 646.)

It would be difficult to find a more direct authority upon the question now under consideration than the case just cited. There was a case where there was no allusion to the Federal question in the pleadings; but an instruction was offered, based in part upon a claim under the Federal Constitution. And in this condition of the record the Supreme Court of Mississippi held that the Federal question had not been properly raised *according to Mississippi practice*, and refused to entertain it or decide

it. But this court held that it was properly and sufficiently raised, and entertained jurisdiction.

So in Rogers v. Alabama, 192 U. S. 226, a motion to quash an indictment was made in the State trial court, which motion was very long, covering more than two pages of the printed record. The motion was stricken from the files in the State Court. On appeal to the Supreme Court of Alabama a judgment of conviction was affirmed, defendant's exceptions to the action of the court in striking his motion from the files being overruled in the Supreme Court "on the ground that the prolixity of the motion was sufficient to justify the action of the court below," there being a provision in the Code of Alabama that "if any pleading is unnecessarily prolix, irrelevant, or frivolous, it may be stricken out at the costs of the party so pleading, on motion of the adverse party." On writ of error from this court to the Supreme Court of Alabama, it was insisted by the Attorney General of Alabama that the motion to quash the indictment had been disposed of by the Supreme Court of Alabama, *merely on the ground of prolixity without deciding the Federal question*, and that this court, therefore had no jurisdiction. But on that subject this court said:

> "We follow the construction impliedly adopted by the Supreme Court of Alabama, and assume that this section" (as to prolixity) "was applicable to the motion. * * * The whole motion takes two pages of the printed record, of the ordinary octavo size. A motion of that length, made for the sole purpose of setting up a constitutional right and distinctly claiming it, can not be withdrawn for prolixity

from the consideration of this court, under the color of local practice, because it contains a statement of matter which perhaps it would have been better to omit but which is relevant to the principal fact averred.

"It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. Jefferson Branch Bank v. Skelly, 1 Black, 436, 443. But that is merely an illustration of a more general rule." (Page 230.)

In Erie Railroad Co. v. Purdy, 185 U. S. 148, the court laid down certain principles on this subject which are directly applicable here, in which the court said:

"But the defendant insists that the general allegation in each of its answers, namely, that the statute, besides being void as a regulation of interstate commerce, was in violation 'of various other provisions' of the Constitution of the United States, was sufficient to have enabled him, at the trial, to insist that the statute, upon which the actions were based, was repugnant to the Fourteenth Amendment of the Federal Constitution. *If the answer had contained no such specific allegation, still, if at the trial of the case the defendant had, in stating the grounds of his motion for nonsuit, or in some other way, distinctly claimed that the statute, on which the actions were based, was inconsistent with that amendment, then it would have been the duty of the Court of Appeals to determine the question so raised,* unless it was waived by the defendant when the case was before that court, or unless its determination could properly be and was placed upon some ground

> of local or general law adequate to dispose of the case. We state the matter in this way because, as said in Carter v. Texas, 177 U. S. 442, 447, 'the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State Court, *is itself a Federal question*, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State." (Page 152.)

It is true that the language which the court here quotes from Carter v. Texas, refers to whether or not the right or privilege "was distinctly and sufficiently *pleaded* and brought to the notice of a State Court," but it has often been held that it is not essential that the claim be "pleaded" in the technical sense of the term pleading. The very case from which we have just quoted, to-wit, Erie Railroad Co. v. Purdy, in the very language we have just quoted, says that if the *answer* had contained *no allegation of this claim*, yet if at the trial of the case the claim had been distinctly asserted, it would have been the duty of the State Court to pass upon it. And in fact in Carter v. Texas itself, where the term "pleaded" is used, the question had not been made by a technical pleading, but by a motion to quash an indictment on the ground of the improper impaneling of the grand jury which found it.

In Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, the court said:

> "Our jurisdiction of this writ of error is asserted under the third of the classes enumerated in Section 709, and it is thoroughly settled that in order

to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required by the State practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. (Citing authorities.)

"The proper way is by pleading, *motion, exception,* or *other action, part,* or being made part, *of the record,* showing that the claim was presented to the court." (Page 308.)

In several of the cases already cited it is shown that it is not necessary that the Federal question be presented by a *pleading.* And in Swearingen v. St. Louis, 185 U. S. 38, the court expressly says it does not mean to hold that it is necessary to *plead* the claim of Federal right, the court saying:

"We do not hold it was necessary to *plead* the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court." (Pages 45, 46.)

In St. Louis & Iron Mountain R'y v. Taylor, 210 U. S. 281, the question as to proper construction of a Federal Act was raised on *motion for instructions,* and this court said:

"There can be no doubt that the claim made here was specifically set up, claimed, and denied in the State Courts." (Page 293.)

Reference is made in the brief in support of the motion to dismiss to the case of Louisville & Nashville Railroad v. Woodford, 234 U. S. 46, in which a writ of error to the Court of Appeals of Kentucky was dismissed; the Court of Appeals having held that the Federal question was not raised on the record in the Circuit Court. But a mere reading of the facts of that case will show it has no bearing upon this one. Woodford had sued the railroad company for damages resulting from an injury to horses shipped from Kentucky to Mexico. In the course of the litigation the bill of lading was filed and was subsequently introduced in evidence. Not only was no reference made in any pleading to any Federal question arising on this bill of lading, but there was no suggestion of such a question on the trial, either by objections to testimony or motions to exclude, nor in the motion for instructions. And among the instructions which the defendant itself had asked for was one to the effect that if the jury should find for plaintiff, it should fix the damages at the fair market value of the horses killed. A verdict was found for plaintiff in a large amount, $15,000.00. A motion for a new trial was then made, and no reference made in this motion to any Federal question. But in the order overruling the motion for a new trial, there was a recital that the court had heard the defendant upon the Federal question as to whether or not the bill of lading was in violation of the Act of Congress, and that the court was of the opinion that the contract did not violate the provisions of the Act of Congress. An appeal was taken to the Court of Appeals of Ken-

tucky, and there the question was raised that the rulings of the Kentucky courts, to the effect that limited valuation clauses in contracts of shipment are void, are in violation of Section 20 of the Carmack Amendment to the Act to Regulate Commerce, and therefore that the recovery in this action ought to have been limited to certain small amounts fixed in the bill of lading, although, as we have already seen, defendant itself had asked an instruction that if the jury should find for the plaintiff, the damages should be fixed at the *fair market value of the horses killed.* On this condition of the record the Court of Appeals said:

> "In view of the fact that the question had been nowhere raised by the pleadings, instructions, or motion for a new trial, or by a motion of any kind, we must conclude that it was raised orally, and was discussed as an academic question."

And again the court said:

> "The futility of appellant's attempt to raise the question, for the first time, and orally, upon the argument of the motion for a new trial, will be easily realized if we should conjecture what order the court could or would have entered, in case it had been of a contrary opinion, to-wit, that the bill of lading did violate the provisions of the Interstate Commerce Act. It could not have sustained the motion for a new trial, because it was confined to grounds specified. (Citing authorities.) Neither could it have given judgment for the appellant upon the pleadings and notwithstanding the verdict, because no Federal question was suggested by the pleadings. At most, the Federal question was merely raised and discussed academically, after the trial

had been completed, and at a stage of the proceedings too late to bring it before this court." (L. & N. R. Co. v. Woodford, 152 Ky. 409, 410.)

Of course this statement by the Court of Appeals as to the condition of the record in that case shows that the decision in that case can have no application whatever to the case at bar.

Furthermore it is to be observed that the Court of Appeals did actually decide that the State Court, in the case at bar, did have the right to allow damages *in addition to the damages allowed by the Interstate Commerce Commission,* referring to those as "special," or, again, "statutory" damages, whereas those in the case at bar are referred to as "general damages."

In other words, the Court of Appeals did in fact deny the claim of defendant under the Act to Regulate Commerce, which it had specially set up, although the court did say "this objection should come by way of a plea in abatement." And in this connection we may call attention to the fact that in Mitchell v. Clark, 110 U. S. 633, where it was insisted that the Supreme Court of Missouri had held a certain plea to be bad on account of the form of the pleading, this court said that, while it was true the opinion of the Missouri Supreme Court had mentioned this objection "*en passant,*" yet it had not decided that to be sufficient to invalidate the plea, and had in fact discussed the defense sought to be made by the plea on its merits, and had decided it; this court saying, furthermore, that the question of whether or not a

plea sets up a sufficient defense under an Act of Congress is a question of Federal law. (Page 645.)

We submit, therefore, in conclusion on this point that the Federal question we have been considering was properly raised in the State Court.

SECOND FEDERAL QUESTION.

Defendant asked of the trial court the following instruction, viz.:

> "The court instructs the jury that defendant, Louisville & Nashville Railroad Company, had a right to keep its cars on its own tracks, and it was not therefore guilty of any wrong in refusing to allow its cars to go off its own tracks." (Record, 58.)

This instruction the court refused, and defendant excepted to the ruling. (Record, 58.) The court then gave certain instructions in which it told the jury that it might find damages if it should find, among other things, that defendant "refused to permit ties shipped by plaintiff to Louisville in carloads to go forward to points on connecting lines without being unloaded," if it was accustomed to do this for other persons under similar circumstances and conditions (Record, 59). And to this instruction defendant objected and excepted (Record, 59). Then, one of the grounds of the motion for a new trial was as follows:

> "To require defendant, against its will, to send its cars out of its possession and off of its tracks into the possession of another railroad company, and upon the tracks of another railroad company, is to

deprive defendant of its property without due process of law, contrary to the provisions of the Constitution of the United States, and especially of the Fourteenth Amendment thereof; and the court's instructions herein in directing the jury that it could allow damages against defendant on account of its refusal to permit its cars to go out of its possession and off its tracks into the possession of another railroad company, and on the tracks of another railroad company, did thus deprive defendant of its property without due process of law, contrary to said Constitution." (Record, 61.)

Here was a right or claim under the Federal Constitution specially set up, and which the court denied in overruling the motion for a new trial.

It is true that the opinion of the Court of Appeals does not mention this question; but it affirmed the judgment, and the judgment could not have been affirmed without denying the right thus claimed by the defendant; because if the court had decided in favor of that right, it would necessarily have reversed the judgment of the Circuit Court.

In the practice of Kentucky, as we have stated, there is no such thing as an assignment of errors on appeal from a Circuit Court to the Court of Appeals; so that any error made by the lower court, which substantially affects the rights of the losing party, and which appears upon the record, is ground for reversal by the Court of Appeals.

And this court has in many cases held that where a Federal question was necessarily involved in an appeal to the highest court of a State, and where the court could

not have decided the case as it did without deciding against the Federal right thus claimed, the Federal right has been denied by the judgment of that court, although it may not have mentioned the question in its opinion; and that this court, therefore, has jurisdiction. This proposition has been so often announced by the court as to make it hardly excusable to cite authorities upon it, though one or two may be mentioned.

In Chicago Life Ins. Co. v. Needles, 113 U. S. 574, the court said:

> "The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below." (Page 579.)

So in Green Bay, etc., Canal Co. v. Patten Paper Co., 172 U. S. 58, the court said:

> "As then in its cross-complaint, the Canal Company explicitly set up and claimed, as the foundation of its alleged rights, the acts of Congress and the transactions between the United States and the Canal Company, under which the United States became the owner of the dam, canal and other improvements on the Fox River, and the Canal Company be-

> came vested with its rights in the surplus water power incidental to said works, and as, in the final judgment, the Supreme Court of Wisconsin *necessarily* held adversely to these claims of Federal right, we hold that the motion to dismiss for want of jurisdiction must be overruled, and that it is our duty to inspect the record in order to see whether there was error in the rulings of the court below." (Page 68.)

In Chicago, Burlington, etc., R. Co. v. Chicago, 166 U. S. 226, the court said:

> "It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States. But that circumstance is not conclusive against the jurisdiction of this court to re-examine the final judgment of the State Court. The judgment of affirmance *necessarily* denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right." (Pages 231, 232.)

Of course the judgment of the Circuit Court in the case at bar and that of the Court of Appeals affirming it, could not have been entered without denying the claim of defendant that to take its cars out of its possession and deliver them to another person, over its objection, or to subject it to damages because it refused to allow its cars thus to be taken from its possession, deprived it of its property without due process of law, contrary to the Federal Constitution.

Therefore, unless the court shall overrule the cases we have cited, and many others of similar kind which might be cited, holding that the State Court will be consid-

ered as having denied a claim of Federal right where the judgment which it did enter could not have been entered without denying that claim, and shall refuse to consider any Federal question, unless the opinion of the State Court considers it, or unless the court is to adopt the practice of hearing evidence as to what questions were argued orally or by brief in the State Court, where the practice is such as in Kentucky, in which there is no assignment of errors on appeal, then it must be indisputably true that the Federal question of which we are now speaking is before this court for consideration.

Counsel for defendant in error say we did not refer to this question in the petition for rehearing in the Court of Appeals. But what of that? There is no law requiring a party to file a petition for rehearing at all, and certainly there is no law requiring him to embrace in a petition for hearing *everything* that was before the court for consideration originally.

THIRD FEDERAL QUESTION.

At the conclusion of the evidence defendant moved the court to give the jury the following instruction:

> "The court instructs the jury that under the Federal Act to Regulate Commerce the defendant Railroad Company was required by said act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have charged and collected a rate different from that which at the

time of the shipment was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission, and in effect, or to have connived at any arrangement whereby the payment of the rate fixed by such tariff should be evaded."

The court, however, refused this instruction and the defendant excepted to the ruling of the court. (Record, 58.)

When we come to consider the motion to affirm, we will explain the relevancy and the great importance to defendant of the instruction here asked for. We now simply call the attention of the court to the fact that this instruction was asked for and that the right to have it was expressly based on the provisions of "The Federal Act to Regulate Commerce."

What we have said about the preceding, or second Federal question, is applicable to this. It was distinctly made in the Trial Court, and although not noticed in the opinion of the Court of Appeals that court could not have affirmed the judgment of the Trial Court without denying defendant's right to have the instruction which it here asked for under the Act to Regulate Commerce.

MOTION TO AFFIRM.

But it is said that if Federal questions are raised on the record they are frivolous and not worthy of argument. We have stated what they are in discussing the motion to dismiss.

DAMAGES FOR CHARGING EXCESSIVE FREIGHT RATES.

One of the grounds given by the Court of Appeals for overruling the objection made by defendant to the judgment permitting plaintiff to recover damages on account of excess freight charges was that—

> "The instructions of the court prevent an allowance of anything for excess freight *or any damage by reason of the act of changing excess freights.*" (Record, 219.)

In other words, the court, in effect, held that no question arose as to whether or not plaintiff could recover in this case any damage by reason of having been charged excessive freight rates, because said the court, the trial court excluded that from the consideration of the jury by its instructions. It is difficult to understand how such a statement can be made upon this record. It is true the court instructed the jury, by its Instruction No. 5, that they must not include in their verdict "any sum or sums representing the difference or differences between the rate for hauling lumber and the 5th class rate paid by plaintiff on shipments of cross-ties" (Record, 60), thus telling the jury not to find for plaintiff the sum, if any, which the Commission had ordered the Railroad Company to pay the Tie Company, and which the record showed had been paid. But this was far from saying to the jury that they should not find for plaintiff *any additional damages resulting from the fact that defendant had made that unlawful charge.* The contention had been made all through the trial of the case that simply

to pay back the amount of the charge with interest did not fully compensate the Tie Company for the injury done its business by tying up its capital and impairing its credit. And the Court of Appeals itself in its opinion had adopted this view, and called special attention to this consideration. In giving reasons for its conclusion that the verdict of $50,000.00 for mere "damage to business" (which was in addition to a number of special items found by the jury) was not excessive, the court, among other things which it enumerates, says that plaintiff "was also deprived of more than $12,000.00 of its invested capital, by way of the excessive freight charges withheld by appellant"; and then says, "the jury had a right to take these things into consideration, and to conclude that simple interest would be poor compensation for capital thus tied up and credit so injured." (Record, 216.) And this was the view of the trial court, and, accordingly, we see in its principal instruction to the jury, Instruction No. 1, the following language bearing upon this particular matter, to-wit:

> "1. If you believe from the evidence in this case that *the rates* on cross-ties which were *found to be unreasonable* by the Interstate Commerce Commission by its order of April 8, 1912, were, to the extent said rates exceeded the rates then in force on lumber, wilfully and maliciously maintained by defendant with the intent to injure plaintiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that said rates which were charged plaintiff were, when so maintained, known by defendant to be *unreasonable* to said extent (or, etc.,

enumerating other possible things the jury might find), * * * and that defendant *by such act, or acts*, if any were committed, *did tie up a part of plaintiff's capital, or did impair or injure plaintiff's business or credit*, or did injure the cross-ties of plaintiff or subject plaintiff to expense as defined in Instruction No. 4, or cause it to lose time from its business of buying or selling ties; and if you further believe from the evidence that *by said acts, or any of them*, if defendant committed such acts, or any of them, the plaintiff's business was damaged, then you will find for the plaintiff in such sum of money as you believe from the evidence will reasonably compensate the plaintiff for such injuries, if any were sustained by the plaintiff, not to exceed in all the sum of $100,000.00." (Record, 59, 60.)

How it can be said, in the face of this language that "the instructions of the court *prevent an allowance of any damage by reason of the act of charging excess freights*," is incomprehensible to us. The instruction expressly allows it, instead of preventing it, and it was in fact the most emphasized feature of the whole case. And the rulings of the court on the motion to exclude testimony, and on defendant's motion for an instruction on this particular subject, make the matter all the clearer; for, as we have seen, defendant moved the court to exclude from the jury "all testimony to the effect that such rates thus charged were too high, or unreasonable, or unjust, for any reason, and all testimony as to any damage done to the Ohio Valley Tie Company by reason of such charges" (Record, 56, Motion No. 2); and the court overruled the motion to exclude this testimony. And again defendant moved the court to instruct the jury

"that it can not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight on the carriage of interstate shipments of cross-ties (Record, 57); and the court overruled this motion, so to instruct the jury. And, as we have seen, the court gave exactly the opposite of this instruction, telling the jury they could consider the act of defendant in charging these unreasonable rates, if they believed from the evidence that it was maliciously done, and that thereby plaintiff's capital was tied up, or its credit impaired and that thereby it was damaged.

It therefore seems to us that for the Court of Appeals to say, as it did say, that "instructions of the court prevent an allowance of any damage by reason of the act of charging excess freights," is simply to say that white is not white or black is not black.

Both the lower court, however, as shown by its opinion on the demurrer to the petition (Record, 22, 23), and the Court of Appeals, as shown by its opinion (Record, 219, 221 and 224), held the view that the Interstate Commerce Commission had no power to award "general damages," that it could only award "special" or "statutory" damages, and that a shipper therefore had a right, when he had been charged excessive freight rates, to go before the Interstate Commerce Commission and there recover his "special" or "statutory" damages allowed by the Act to Regulate Commerce, and also go into a State Court and recover "other or additional" or "general" damages. We submit that this is an entirely erroneous view

to take of the effect of the Act to Regulate Commerce; that, on the contrary, the Interstate Commerce Commission has authority to award *whatever damage* a party suffers by reason of a violation of the Act to Regulate Commerce, such as the charging of excessive freight rates; and that while, in the first place, he has an election to go either before a *Federal Court* (not a State Court), or the Interstate Commerce Commission, with his claim for damages, and while, if he does go before the Commission and does get an award of damages, fixing the amount and ordering its payment by the carrier, he can then go into either a State or Federal Court to enforce the award *if the carrier refuses to comply with it,* yet if the carrier *does comply with it,* he can not go into *any court, either State or Federal,* with a claim for further damages based either in whole or in part on those same acts of which he complained before the Commission. But in no event, we submit, has a State Court jurisdiction of any action seeking damages for a violation of the Act to Regulate Commerce, except an action to enforce an order of the Commission for the payment of money which has not been complied with. And this is not such an action.

We have already quoted the applicable section of the Act to Regulate Commerce, to-wit, Sections 8, 9 and 16, from which we have seen that by Section 8 any common carrier which shall violate any provision of the Act to Regulate Commerce "shall be liable to the person or persons injured thereby for *the full amount* of damages sustained in consequence of any such violation of the pro-

visions of this act"; and by Section 9 that the person thus damaged may either make complaint before the Commission or before a Federal Court "for the recovery of the damages for which such common carrier may be liable under the provisions of this act"; but that he can not pursue both remedies; and finally that, by Section 16, if he does go before the Commission and does get an award of damages, and an order for payment, then the only liability to suit to which the carrier is subjected is that, *if it does not comply with the order of the Commission for the payment*, the shipper may bring suit to enforce the order either in a Federal or a State Court of competent jurisdiction; the right to go into a State Court in this latter event being given for the first time by the Amendment of June 1, 1910. And we submit that this is the construction which this court has twice put upon the Act to Regulate Commerce in very late decisions.

In Penna. R. Co. v. International Coal Co., 230 U. S. 202, where the shipper was complaining that it had been damaged by a discrimination in rates in favor of another shipper, this court said:

> "Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the government and, in addition, was liable for all damages it thereby occasioned the plaintiff or any other shipper. But under Section 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the car-

rier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because Section 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be *'liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, * * * together with reasonable attorney's fee.'* In view of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899." (The above words italicized are the court's own italics—pages 202, 203.)

The case just cited was a suit brought in the Federal Court without any application having been made to the Interstate Commerce Commission; and involved, not an overcharge of unreasonable rates, but a discrimination in that to another shipper an unlawful charge was made, which was less than the published rates, a case, therefore, where the shipper could and did go into a Federal Court in the first instance, the violation of the statute appearing as matter of law, and did not go before the Commission at all. The case therefore did not

involve the question of what damages *the Commission* could allow. But it did involve the construction of Section 8 of the Interstate Commerce Act, as to what damages one could recover for a violation of any provision of the act, and it will be seen that the court there held that the damages might be the same as the rebate which had been allowed, or might be less, or might be many times greater but, "*whatever they were* they could be recovered," because Section 8 expressly declares that the carrier violating the act shall "be liable to the person injured thereby *in the full amount* of damage sustained in consequence of such violation."

Subsequent to the decision of the case just mentioned, the court, on February 23, 1915, decided the case of Meeker v. Lehigh Valley R. Co. (~~123~~ U. S. 412), which reaffirms the principles of Penna R. Co. v. International Coal Co., and applies them *to a proceeding before the Interstate Commerce Commission,* where the complaint was that the shipper had been charged extortionate rates for the transportation of coal. The Commission in that case had made a finding that the rates were unreasonable, and had made an award of damages and an order for the payment of money, the amount being the difference between the rates which the shipper had paid and the rates which the Commission held were reasonable. And on that subject this court said:

> "But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really

disclose is that the Commission, 'upon consideration of the evidence adduced upon the hearing upon the question of reparation' found (a) that by reason of the unjust discrimination resulting from giving the rebate to the Lehigh Valley Coal Company, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the coal company; and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. *The Commission was authorized and required* by Section 8 of the Act to Regulate Commerce to award '*the full amount of damages sustained*' and that, of course, was to be determined from the evidence. If it showed that the damages correspond to the rebate in one instance and to the overcharge in the other, the claimant was entitled to an award upon that basis. The case of Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to Section 8, said (p. 203): 'The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were they could be recovered.' There is nothing in either report of the

Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it." (P. 428.)

Thus it has been distinctly held by this court that by he provisions of the Act to Regulate Commerce a hipper is entitled to recover the full amount, whatever hat may be, of damages sustained by him by reason of ny violation of that act, which includes the charging f unreasonable rates; and that the Commission is au- ıorized and required by that act to give this relief. So ıere can be no question of the authority, duty and power f the Commission to award to a shipper all the dam- ge, whatever it may be, which he has sustained by ason of the violation by a carrier of the Act to Regu- te Commerce. And when such a shipper has gone be- re the Commission and has obtained an award of dam- es on account of such violation, and has secured an der for the payment by the carrier of the damages ıs awarded, the shipper must rest satisfied with this, the carrier chooses to comply with the order; because only condition upon which the statute then permits shipper to go into court with a complaint on account that same violation of the statute is in case the carrier s not comply with the order. And if the carrier should comply with the order and the shipper does choose ue upon it, the order is made *prima facie* evidence of

the facts found by the Commission, one of which is that the amount of his damage is the amount stated in the order. But unless he alleges, whether he sues in a State Court, or in a Federal Court, that the carrier has not complied with the order, he states no cause of action. And, as said before, the only condition *under which a State Court is given jurisdiction* of an action for damages on account of a violation by a carrier of the Act to Regulate Commerce, which includes of course the charging of unreasonable interstate rates, is where the shipper has gone before the Commission with a claim for damages, and has received an award of damages, with an order for the payment of the same, and *the carrier has failed to comply therewith.*

It is true the *carrier* is not bound by the Commission's award of damages, and if the carrier chooses to dispute it and to contest the matter he may refuse to pay, and when the shipper sues upon the order the carrier may make an issue, and while the finding of the Commission is *prima facie* evidence, yet the carrier may rebut that evidence by testimony to the effect that the shipper was not thus damaged. But the *shipper* can not dispute the order if the carrier is willing to pay it. And there is nothing unjust about this; because it was the shipper's own voluntary action when he went before the Commission and claimed damages and got an award of damages; and having elected to claim damages before the Commission, and having received an award, it is only fair and just that he should be required to abide by it. On the other hand, inasmuch as the carrier had no election

in the matter and could not refuse to appear before the Commission, but was drawn before it by the act of the shipper, it is but fair and right that the carrier should be allowed to dispute and contest the finding of the Commission as to the damage, if it chooses to do so. And such it seems to us is the law, written so plainly that there can be no reasonable controversy over it.

Now applying these principles to the case at bar, when the Commission had held that the rates charged were unreasonable, the shipper then had an election under Section 9 as to where he would go with his claim for damages, not as to whether he would go before the Commission or into a *State* Court, but whether he would go before the Commission or into a *Federal* Court (Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S. 250). And then, having gone before the Commission with his claim for damages, and having gotten an award and an order for the payment of money, while a State Court under Section 16 would have had jurisdiction of a suit to enforce the order, if the carrier had not complied with it, yet, as the carrier did comply with it, no such jurisdiction arose.

Yet, as we have seen in the case at bar, where it appeared that the shipper had gone before the Commission and had claimed damages and had gotten an award and an order for payment, and the order had been complied with by the carrier and the money received by the shipper, it was held, over the objection of the carrier, that the court, a State Court, could give the shipper "other and additional" damages to those awarded by the Commission, damages which the court calls "general damages,"

the court saying that the only damage which the Commission was authorized to award is what the court calls "special" or "statutory" damages. And this we submit is directly in the face of the plain provisions of the Act to Regulate Commerce, and of the adjudications of this court.

The principle which we assert and its application are not avoided by saying that the charging of the rates complained of before the Commission constituted *only part* of the wrongs complained of by plaintiff in the case at bar. They certainly constituted a very important part. They lay at the foundation of the whole controversy. In its amended petition, setting up its proceeding before the Commission, and the Commission's action, plaintiff said:

> "Plaintiff further states that *all the expenses* which it alleged in its original petition that it had incurred on account of the publication by defendant of the extortionate interstate rates on ties, and *all the damages* which it alleged in its petition that it had suffered as a result of the publication of said interstate rates, *were incurred and suffered as a result of the publication of said extortionate rates which were condemned by the Interstate Commerce Commission by its said order of April 8, 1912,* in case No. 4411, Sub. No. 1, and plaintiff further states that the interstate rates on ties of the publication and collection of which it complains by its original petition are the rates condemned by said order of April 8, 1912." (Record, 26.)

In other words, says plaintiff, the rates of the publication and collection of which we complain herein, and on account of which we were compelled to incur the cost

and by reason of which we sustained the damage which we seek to recover in this action, were the identical rates, and none other, of which we complained before the Commission as violations of the Act to Regulate Commerce, and which were covered by its order of April 8, 1912, condemning those rates and fixing the damages for which the carrier was liable, which the Act says is "*the full amount of damages sustained* in consequence of any such violation of the provisions of this Act." And yet the court in this case held that, having gotten this award of the full amount of damages sustained by the violations of the Act complained of before the Commission, and having collected it, plaintiff could recover *other and additional damages* in that court, a State Court, on account of the identical violations complained of before the Commission; and plaintiff's case is not helped by the fact that in its petition it simply *adds to these alleged violations* in charging and collecting the rates complained of *other alleged wrongs,* such as unreasonably refusing to allow defendant's cars to go through to destinations off of defendant's lines, etc., which were in fact *merely incidental to the main question of the rates complained of,* and were steps taken to protect those rates and prevent their evasion while in force, as heretofore shown, and as will be further explained and commented upon hereafter. Nor can the matter be helped by injecting the further charge of *malice* into it all.

To conclude on this subject, the foundation of this whole suit for damages is the complaint that the Railroad Company charged and collected alleged *excessive rates on*

cross-ties, and that it refused to furnish any cars except its own for their transportation and refused to let its cars go off its lines, *the latter two causes of complaint being clearly incidental to the first,* because plaintiff's own president says it had no trouble about cars until this controversy over the *rates* arose (Record, 118), and that even afterwards defendant would turn the cars over to connecting lines *if plaintiff would pay the interstate rates* (Record, 109), yet the main wrong here complained of, viz., the charging of excessive rates, is not only a violation of the Act to Regulate Commerce (of which a State Court has no jurisdiction, except in a suit to enforce an award of the Interstate Commerce Commission), but is one of which plaintiff has actually made a complaint as such a violation before the Commission and obtained an award of damages, and an order on defendant for its payment, which order has been complied with. We therefore submit that the State Court in Kentucky had no jurisdiction of this action, certainly none so far as it is based on defendant's alleged wrong in charging excessive rates, which is the complaint lying at the foundation of the whole matter; and furthermore that, as plaintiff complained of that wrong before the Interstate Commerce Commission and got an award of damages therefor, which has been paid, no court, either State or Federal, can give any further or other damages based on those same alleged wrongs.

COURT'S ERROR IN REFUSING TO INSTRUCT THE JURY AS TO DEFENDANT'S DUTY TO PROTECT ITS PUBLISHED RATES, AND NOT TO CONSPIRE AT ANY SECRET REBATE.

At the conclusion of the evidence defendant moved the court to instruct the jury as follows:

> "The court instructs the jury that under the Federal Act to Regulate Commerce, the defendant Railroad Company was required by said Act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have charged or collected from any such shipper a rate different from that which, at the time of the shipment, was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission and in effect, *or to have connived at any arrangement whereby the payment of the rate fixed by such tariff should be evaded.*" (Record, 98.)

The fact that tariffs had been filed by defendant with the Interstate Commerce Commission, and that they mentioned cross-ties in the 5th class had been completely proved. Plaintiff's president said he knew this as to the period beginning with 1910, which covered the period of the controversy (Record, 131, 132), and Mr. Dulaney, a witness for defendant, proved these facts as far back as 1902, and for a period covering all the transactions involved in this action (Record, 170, 179, 180).

The court, however, overruled the motion for this instruction, to which the defendant excepted (Record 98).

That the instruction requested states a proposition of law that is true, we suppose will hardly be disputed. It is the absolute legal duty of a railroad company to conform to its tariffs, and not to evade or connive at the evasion of these tariffs. For a violation of this legal duty it is criminally liable (Penna. R. Co. v. International Coal Co., 230 U. S. 202). Whatever, therefore, may have been defendant's liability for publishing and charging rates that were more than reasonable, and which the Commission thereafter condemned, and ordered defendant to cease charging, it was undoubtedly its duty to charge them as long as they were in effect, and it could not be held liable in damages for using effective means to prevent the evasion of these rates. And this was the instruction which defendant asked the court to give the jury. And from the facts, which we have already stated, the court can readily understand the value to defendant of such an instruction in this case. It is unquestionably true, as we have already shown, that plaintiff was attempting from the middle of 1910, down to the fall of 1911, which is the period covered by this controversy, to evade the payment of interstate rates on its shipments of cross-ties by a device which would make the shipments appear to be intrastate shipments. And defendant, on the other hand, was trying to prevent this evasion and to force the payment of interstate rates on what were in truth and in fact interstate shipments. We have already seen that the plaintiff's president and chief witness, Mr. Bush, while stating that "the bulk of our ties at that time were interstate shipments," referring to a period during

1908 and 1909 (Record, 69), which manifestly continued to be true to the end, yet says that until some date in 1910, defendant did not actually charge its published interstate tariff rates on these shipments (Record, 73), but that in 1910, it began charging the interstate rates on these interstate shipments; therefore, he says, "when we received the second settlement showing all cars were now being assessed at the higher rate, *we changed our method of doing business.* We shipped those cars to the Ohio Valley Tie Company, Louisville, Ky., in care of the Big Four Railroad Company and paid the Louisville & Nashville Railroad Company freight up to Louisville at the lumber rate, and reconsigned the cars to the Nickel Plate" (Record, 75). And on cross-examination he admits that subsequent to this change "the business was practically the same character of business that it had been before" (Record, 138); and that it was interstate business is hardly subject to doubt (Texas, etc., R'y v. Sabine Tram. Co., 227 U. S. 111).

Defendant saw and knew what was being done and understood the purpose of it, to-wit, to evade the published rate on these shipments, and it sought to prevent the evasion by insisting that if the shipments were honestly mere shipments to Louisville, and only intrastate rates were to be paid, then the cars should be unloaded at Louisville, the cars being retained by the Louisville & Nashville Railroad Company; although it stated that if plaintiff would pay the interstate rates on the shipments, thus treating them as interstate shipments, it was willing that the cars should be turned over to con-

necting carriers and be allowed to go on through to destination, without being unloaded. Mr. Bush himself, plaintiff's president, states that this was the position of defendant (Record, 109). And for the same reason, and in order that it might be able to retain this means of forcing compliance with its published rates, defendant insisted that this particular company's ties be loaded in L. & N. R. Co.'s cars, which it could control.

But although these acts were taken in order to prevent the evasion of its tariffs by the Tie Company—for plaintiff's president admits that plaintiff had had no trouble with the Louisville & Nashville Railroad Co. *until this controversy arose* (Record, 118)—and although it was not only defendant's right, but its duty to do what it could to prevent this evasion, yet the steps which it took for this purpose, in refusing to allow its cars to go through to destinations beyond Kentucky loaded with these cross-ties, and in insisting that L. & N. cars should be used, in order that this control might be retained, were relied upon particularly as showing defendant's *malice* towards plaintiff. And, as we have seen, the court in its instruction, specifies those acts among the things complained of against defendant, while at the same time refusing to say to the jury that it was the legal duty of defendant to charge and collect from all shippers of interstate traffic its regular tariff rates, so long as they were in effect, and not to connive at any arrangement whereby they should be evaded.

It was vital to defendant that the jury should have been told this, and to understand it; because, as said

before, whatever may be the liability of defendant for publishing and charging what are claimed to be extortionate rates, it was not only its right, but its absolute legal duty, to protect those rates and prevent their evasion as long as they were in effect. And it had a right, therefore, to have the jury told that this was true, in order that it might argue to the jury that these acts upon which so much stress was laid, to-wit, the refusal to allow defendant's cars to go beyond its lines, unless the interstate rate should be paid, and its requirement that the ties of this company be loaded in L. & N. cars, in order that this control could be retained, were not evidences of malice on its part, but were lawful acts done for the lawful purpose of protecting its tariff and preventing their evasion so long as they were in effect. But the court refused to give the instruction and submitted the evidence as to those acts to the jury and specified the acts themselves in the instruction to the jury, without any explanation of what the law is on this subject of protecting the legally published tariff rates, even though they be too high.

Counsel argued that the defendant, if it had seen fit, could have reduced the tariff rates by application to the Commission. That may be true. And it is also true that plaintiff could have applied to the Commission for a general order condemning the classification of cross-ties as they were carried in the Louisville & Nashville Tariffs (see first twenty lines of Section 15 of the Act to Regulate Commerce as amended by Act of June 18, 1910). But it never did so, as its president states (Record, 135).

But that is neither here nor there; although defendant might have changed its classification or reduced its rates, and did not do so, and although plaintiff might have applied to the Interstate Commerce Commission for a general order condemning defendant's classification of cross-ties, and did not do so, yet so long as the tariffs were in effect, it was the duty of defendant to enforce them and not to suffer them to be evaded. And if wrong was done it was in making an improper classification and charging improper rates, and was not in adopting the means which it did adopt to enforce those rates and prevent the evasion of them, so long as they were in legal effect. Yet these latter acts were relied on as evidences of malice, and as being gross violations of law and of right, and are singled out in the court's instruction without any explanation, the court expressly refusing to give any explanation to the jury of what the law upon the matter is, which would have enabled the defendant to contend before the jury that these acts here referred to were lawful and not unlawful, that they were attempts to conform to the law, and not malicious violations of it.

We think the case of Texas & Pacific R'y v. American Tie Co., 234 U. S. 138, has a direct bearing upon the feature of the case which we are now discussing. In that case the Tie Company sued the Railway Company for damages for refusing to ship cross-ties in interstate commerce. The principal defense of the Railway Company was that it had no published rate on cross-ties and therefore could not ship them, because it could not fix a rate.

The court held that this was a good defense, saying:

"There is no room for controversy that the law required a tariff and therefore if there was no tariff on crossties, the making and filing of such tariff conformably to the statute was essential" (146). One of the points of insistence by the plaintiff in the case was that the Railway Company's refusal was not in good faith, and that the absence of a schedule was a mere 'pretext and device." The court enumerated this position of plaintiff, among others, in contending that the usual rule requiring an application to the Interstate Commerce Commission before calling upon the courts, should not apply to the existing case, and the court stated the defendant's position on this point, and the court's response as follows:

> "(d) Because the Railway Company did not refuse to transport the ties in *good faith,* and insisted upon the absence of a scheduled rate simply as a pretext and device for preventing the shipment of the ties and their delivery in performance of the contract with the Union Pacific Railway, and with the ulterior and wrongful motive of keeping the ties on its line so as to be able to purchase them itself from the Tie Company. But without pausing to do more than direct attention to the fact that this proposition is necessarily disposed of by what we have said, that is, *by the lawfulness, in view of the state of the existing and filed tariff,* of the refusal until the Commission had acted, we think all the contentions under this last head are completely answered by the statement that the suit was based upon the unlawfulness of the action of the Railway Company in refusing to carry the ties in view of the filed tariffs, and therefore the contentions are not open for our consideration." (Page 148.)

The part of the quotation just made which bears specially on the present case is where the court calls attention to the fact that the Tie Company's charge of bad faith against the Railroad Company for refusing to take the ties, and its charge that this was a mere pretext or device in preventing shipment, to which it was moved by the wrongful motive of keeping the ties on its line, so that it might be able to purchase them, was all answered and disposed of "by the lawfulness, in view of the state of the existing and filed tariff, of the refusal until the Commission had acted." And that is exactly the principle upon which we are now insisting, namely, that whatever may be plaintiff's charge of bad faith and wrongful motive in publishing rates on cross-ties that were unreasonably high, yet so long as those rates were in force, it was the legal duty of the Railroad Company to maintain them, and not to permit them to be evaded; and therefore its actions taken to prevent the evasion that was being manifestly attempted were lawful, and can not themselves be made grounds for giving damages.

We therefore respectfully submit that defendant was clearly entitled to have the offered instruction now under consideration given to the jury, in order that the jury might intelligently understand the situation and be able at least to appreciate defendant's claim as to the meaning and purpose of its acts.

DAMAGES FOR REFUSAL OF DEFENDANT TO PERMIT ITS CARS TO GO OUT OF ITS POSSESSION.

As we have seen, the point was clearly and distinctly made that defendant had a right to retain possession of its own cars, and that to take them from its possession and transfer them to the possession of another, against its consent, or to give damages against it because it refused to allow its cars to go out of its possession, was a deprivation of defendant's property, without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution. And we submit that the truth of this proposition is settled by the case of Central Stock Yards Company v. Louisville & Nashville Railroad Company, 212 U. S. 132. In that case a suit was brought in a State Court in Kentucky by the Central Stock Yards Company against the Louisville & Nashville Railroad Company, seeking to compel the Louisville & Nashville Railroad Company to deliver up its cars loaded with live stock to the Southern Railway Company, to be transported by the Southern Railway Company to the Central Stock Yards Company, the yards of which constituted the live stock depot of the Southern Railway. A judgment was entered for the plaintiff, granting the prayer of its bill. We quote this court's statement as to part of the judgment, as follows, to-wit:

> "The Railroad Company was ordered (1) to receive at its stations in Kentucky, and 'to bill, transport, transfer, switch and deliver in *the customary way*,' at some point of physical connection with the tracks of the Southern Railway, and particularly at

> one described, all live stock or other freight consigned to the Central Stock Yards or to persons doing business there. (2) It was ordered further, to transfer, switch and deliver to the Southern Railway at the said point of connection, 'any and all live stock or other freight coming over its lines in Kentucky consigned' to the Central Stock Yards or persons doing business there." (Page 141.)

The Court of Appeals of Kentucky affirmed the judgment and a writ of error was prosecuted from this court. Among other things it was insisted that the judgment ordering defendant to send its cars out of its possession, even though the Court of Appeals had held that this was required by Section 213 of the Constitution of Kentucky, was a taking of defendant's property without due process of law, contrary to the Fourteenth Amendment to the Constitution, and on that subject this court said:

> "It was argued, however, that the *requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property.* In view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal un-

discriminating requirement, with no adequate provisions such as we have described. The want can not be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. (Citing authorities.) It follows that the requirement of the State Constitution can not stand alone under the Fourteenth Amendment, and that the judgment in this respect also, being based upon it, must fall." (Pages 143, 144.)

The only difference between that case and this case is that in that case a court of equity ordered the Railroad Company to deliver its cars out of its possession and into the possession and control of another, "in the customary way," for the benefit of the Central Stock Yards Company, and justified this judgment by Section 213 of the Constitution of Kentucky, which it construed as requiring an interchange of cars between Railroad Companies having physical connection; whereas, in the case at bar, a court of law has given judgment for damages against that same Railroad Company, because it refused to pursue that same character of procedure for the benefit of the Ohio Valley Tie Company.

And, as this court held in the Central Stock Yards case, that the effect of the court's action was to deprive defendant of its property without due process of law in the absence of a valid law providing for the interchange of cars under proper restrictions and regulations for the protection of the owner of the cars against loss and undue detention of cars and securing due compensation for their use; and as no such law has been passed or adopted since that decision covering any such subject, we can not see

why it is not absolutely conclusive upon this question in the case at bar.

It was contended in the State Court that such interchange of cars was "customary," and it should doubtless be mentioned that the instruction of the trial court to the jury submitted to them the question of damages only in the event they should find that defendant was *accustomed*, under substantially similar circumstances and conditions, to permit its cars to go forward upon other lines without being unloaded. But it must be observed that the judgment in the Central Stock Yards case likewise ordered the cars to be delivered to the connecting carrier only "in the customary way." (212 U. S. 141.) And there was proof in that case, as well as in this case, about the custom of railroads to interchange cars, there being also proof in that case, as in this case, that while railroad companies do very frequently exchange cars, yet they reserve a right not to exchange them, and frequently do refuse to exchange them. And in the case at bar it was shown, as we have already seen, that the Ohio Valley Tie Company was attempting to evade the published tariff rates of the Louisville & Nashville Railroad Company by its manner of shipping its freight, and therefore, to make what were really interstate shipments under the pretense of intrastate shipments for that purpose, although at the same time trying to use defendant's cars for the through carriage of the Tie Company's freight on to other lines beyond Kentucky. And there is not a scintilla of evidence from any witness that any other shipper had tried to do that thing, or that there was

any occasion for the Louisville & Nashville Railroad Company to refuse an interchange of cars in order to block an attempt by any other shipper to evade its rates.

Mr. Milton H. Smith, President of the Louisville & Nashville Railroad Company, was called as a witness by the plaintiff, the Tie Company, and was asked about the custom of a railroad company to allow its cars to go upon other lines, and he explained at length what the practice was, explaining that it allows this in many cases, but that "no company allows its cars to leave its line except with its consent, and when in the opinion of the management its interest will be promoted thereby" and that it frequently would be most disastrous to a railroad company if it could be required to allow its cars to go off its lines (Record, 159); and being asked the specific question if he would allow a car, even a car belonging to another company, to be loaded on the line of the Louisville & Nashville Railroad Company and transferred to another company, when he believed that the purpose was to make an interstate shipment under the guise of a State shipment, so as to pay only the State rate when the interstate rate was due, he of course said he would not (Record, 160, 162).

We submit, therefore, that the ruling of the State Court that defendant could be mulcted in damages for refusing to send its cars off its line, the protection of the Federal Constitution being specially set up and claimed on this point, was manifestly erroneous, as settled by this court's decision in Louisville & Nashville Railroad Company v. Central Stock Yards Co., 212 U. S., *supra*.

CONCLUSION.

We therefore submit, in conclusion (1) that the court has jurisdiction of the writ of error herein; (2) that the questions raised on the writ are not frivolous, and that the case is entitled to that time for argument that is ordinarily allowed by the rules of the court, and (3) that the motions to dismiss, affirm or transfer to the summary docket should therefore be overruled.

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April 12, 1915.